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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

No. 1253.

In the Matter of V-I-D, INC., Debtor.

MARGUERITE S. GLOVER,
Petitioner,

vs.

McM. COFFING, Trustee in Bankruptcy, V-I-D, Inc., Debtor;
LAWRENCE H. PRYBYLSKI, as Intervening Trustee;
and CHARLES J. KRAMER, Intervener,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ALFRED P. DRAPER,
KENNETH CALL,
Attorneys for Respondents.

INDEX.

Cases Cited.

Other Citation.

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THE OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 758 Federal Reporter (2d) 964. The opinion is also printed in full in the record (R. 181-185).

I.

JURISDICTION.

The jurisdiction of this court is invoked under Title 28, Section 347 (a) Judicial Code, Section 240, amended.

II.

QUESTION PRESENTED.

The question is presented to this Court—Can the vendee of real estate be deprived thereof through the enforcement of a foreclosure judgment, obtained at a time when its vendoe was still the owner thereof, in a suit in a state court which court had no jurisdiction over the person of the vendor or the subject matter of the suit, and to which suit the vendor was not even a party, and which judgment was subsequently vacated, opened up and set aside?

III.

STATEMENT OF THE CASE.

The question arose in the District Court in the following manner:

A corporate debtor (respondent V-I-D, Inc.), filed a reorganization petition under Chapter X of the Bankruptcy Act, listing the real estate in question as its asset (R. 1). The District Court appointed respondent, McM. Coffing, as its Trustee in proceedings for the reorganization of the corporation, and he took possession of the real estate. On December 1, 1939, the petitioner herein, Marguerite S. Glover, filed an intervening reclamation petition in the reorganization proceeding, claiming to be the fee owner of this real estate under an independent title adverse to the title asserted by the corporate debtor and its Trustee.

Petitioner's title is based upon the judgment of the Lake County Superior Court, sitting at Gary, Indiana, foreclosing a special assessment lien against the real estate in question (R. 13-14, 106), in which cause one Don Hoover and ..... Hoover, his wife, were alleged to **claim some interest** in the real estate described (R. 84, clause 18). The interest of Hoover and his wife, if any, was not determined by the court (R. 90), although a judgment was entered of record against the interest of said Hoover and wife in the real estate. Their interest, if any, in the real estate was not determined by the court (R. 89-91). Subsequently, the judgment was vacated, opened up and set aside by the court in which it was obtained (R. 23-26, 95-96). (Our emphasis.)

Following the entry of the order by the state court vacating, opening up and setting aside the judgment, the mortgagee trustee filed answer to the complaint in the cause (R. 45, 117) and tendered and paid over to the Clerk of that Court for the use of the plaintiff in said cause the sum of Five Hundred Twenty ($520.00) Dollars, representing the amount alleged to be due the plaintiff, together with the costs of that action (R. 45, 117-118) and said cause is still pending and undisposed of (R. 117-118).

The title of the corporate debtor and trustee, respondents, is based upon a Quit-Claim Deed from the former owner, Don Hoover, a bachelor, of Jasper County, Indiana.

The District Court adjudged that the state court's foreclosure judgment is a nullity as to the then owner, Don Hoover, and his Grantee, the corporate debtor, respondent, thereby striking down petitioner's purported title and upholding the title of the corporate debtor and trustee, respondents on the ground that

1. The service of summons on the Don Hoover, who had no interest in the property, could not give jurisdiction to the state court over the Don Hoover who owned the property (R. 133).

2. Don Hoover, the owner of the property, was not the defendant or a party to the action. Actually, a person named Don Hoover, living in Gary, Indiana, and not the Don Hoover, owner of the property, was the defendant to the action and against whom judgment was taken (R. 134).

The error in the party defendant and service on one, not the owner of the real estate, is apparent from the record here.

The complaint named Don Hoover and ..... Hoover, his wife, whose true Christian name is unknown, 2212 West 12th (R. 125).

Summons was issued in the cause to Don Hoover and ..... Hoover, his wife, whose true Christian name is unknown (2212 West 12th Avenue, Gary) (R. 86), and those parties were served by the Sheriff (R. 87).

The Quit-Claim Deed, whereby Don Hoover conveyed the real estate to the corporate debtor, respondent, and which was introduced and received in evidence without any proper objection appears in the record as petitioner's Exhibit Number 6 (R. 118-119), and recites that "Don Hoover, **a bachelor**, of Jasper County, in the State of Indiana, Release and Quit-claim to V-I-D, Inc., an Indiana corporation of Lake County, in the State of Indiana, the corporate debtor, respondent". (Our emphasis.)

The facts on which the Circuit Court of Appeals based its decision were:

(1) Summons was issued to the Sheriff for service upon Don Hoover, giving his address as 2212 West 12th Avenue, Gary, Indiana, that address being endorsed in the complaint.

(2) There was a Don Hoover living at the address given in the summons and endorsed in the complaint, and service was had upon him at that address. He was not, however, the Don Hoover who was the fee simple owner of the real estate in question, but was another man of the same name (R. 182).

(3) The Don Hoover served had no interest in the real estate, and never asserted any interest therein. The Don Hoover who owned such real estate was a resident of Jasper County, Indiana, and never received any notice of the foreclosure proceedings (R. 182).

(4) That the judgment was thereafter vacated and set aside; the Trustee filed answer and tendered into Court the amount claimed to be due on the special assessment (R. 182).

(5) That the Master found there was no fraud in securing the decree (judgment) against the Don Hoover **served** with process, but that he had no interest in the real estate (R. 184). (Our emphasis.)

The Court stated:

> "It is undisputed that Don Hoover of Jasper County, the owner of the real estate in question, was never served with notice of the foreclosure proceedings in the Superior Court of Lake County. The fee simple title to such real estate remained in him, after the foreclosure proceedings, the same as before those proceedings, because, having had no notice thereof, he was in no manner bound or affected thereby. It is also undisputed that he executed and delivered to V-I-D, Inc., the debtor in the bankruptcy proceedings, a quit-claim deed for such real estate, thereby

conveying to it the fee simple title thereto. It is the contention of the intervenor that, under the Indiana Law, the right to attack the judgment in foreclosure was personal with Hoover, and did not pass to his grantee. It must be remembered, however, that the conveyance of the real estate in question from Hoover to the bankrupt was by means of a quit-claim deed, and not by warranty deed. There were no covenants in such deed upon which the grantee could rely. After the execution of this deed, Hoover had no interest in the real estate, as his interests had passed to his grantee, and any rights acquired by the vacation of the judgment passed to his grantee, the debtor in the bankruptcy proceedings. Intervenor further contends that if V-I-D, Inc., succeeded to Hoover's right to attack the judgment, such attack must be made in the court which rendered the judgment, and cannot be made in the Federal Court. The law is clear in Indiana that where a judgment is rendered without jurisdiction of the subject matter or without jurisdiction of the person, the judgment is void. We agree with the finding of the District Court that Don Hoover, the owner of the real estate in question, was not even a party to the foreclosure proceeding. The address of Hoover given on the summons was that of the Hoover of Gary who was served but who had no interest in the real estate." (R. 184-185.)

ARGUMENT.

Petitioner contends that the courts below have not predicated their decisions on any special power of a District Court sitting in bankruptcy; that petitioner is not a creditor of the debtor corporation, respondent, but is asserting a title adverse to the debtor and its Trustee, and that the Trustee has no greater right to attack the foreclosure judgment than the debtor corporation or its grantor. Respondents agree with this contention.

A.

Petitioner further contends that the decision below is in conflict with an established rule of the Indiana Courts which requires courts of co-ordinate jurisdiction to give full faith and credit to each others' judgments when the alleged infirmity does not appear on the face of the judgment record. Citing Bruce v. Osgood, 154 Ind. 375, 378, and Emerick v. Miller, 159 Ind. 317, 327.

These cases thus relied upon are not in point because, in each a party to the suits and over whom the court had jurisdiction attempted to have a judgment valid on its face held to be void in a collateral attack. Respondents concede that so long as a judgment stands, not being void, it concludes **the parties** thereto upon the subject therein determined. (Our emphasis.)

In the case at bar, service was had upon the Hoover and wife sued and the judgment entered is good and valid as to them. It may not, however, be enforced against the lands of the Don Hoover who was not a party to the suit and who had no notice thereof.

B.

Petitioner further contends that the decision is in conflict with an Indiana rule of judgments that an Indiana foreclosure judgment is valid in spite of lack of notice to the owner, unless this jurisdictional defect affirmatively appears on the face of the foreclosure record and she relies upon the following cases: Miedreich v. Lauenstein, 232 U. S. 236, 246-247, 34 S. Ct. 309, 312, 58 L. Ed. 584, 591 (affirming 172 Ind. 140, infra). Miedreich v. Lauenstein, 172 Ind. 140, 141-144, 86 N. E. 963, 87 N. E. 1029. Johnson v. Patterson, 59 Ind. 237, 239, 240. Nichols v. Nichols, 96 Ind. 433, 434, 435. Clark v. Clark, 202 Ind. 104, 113, 114, 172 N. E. 124. Chicago, etc., R. Co. v. Grantham, 165 Ind. 279, 289, 75 N. E. 265. Smith v. Hess, 91 Ind. 424, 425.

These cases likewise are not in point because they are cases where either the defendant who was sued and over whom the court had at least apparent jurisdiction attempted to attack the judgment by impeaching the return of the sheriff or cases where an attempt was made in a collateral attack to have a judgment valid on its face held to be void. We agree that the return of a sheriff is conclusive, as to matters presumptively within the personal knowledge of the officer, against the **defendant** in the action and conclusive between the **parties** thereto and cannot be contradicted by parol evidence. (Our emphasis.)

In the case at bar, Don Hoover, the owner of the land was not a defendant therein or a party thereto. The return of the sheriff is correct as to the person he served, but he served a Don Hoover who had no interest in the land. His service of **this** Don Hoover could not give jurisdiction of the State Court over **the** Don Hoover who owned the property nor over the property. (Our emphasis.)

C.

Petitioner lastly contends that the decision is in conflict with an Indiana rule of judgments that the identity of parties to a judgment must be ascertained exclusively by inspection of the record and she earnestly relies upon Sturgis v. Rogers, 26 Ind. 1, 9. Osborne v. Storms, 65 Ind. 321, 325. Davis v. Gray, 16 Wall. 203, 21 L. Ed. 447, 453. 42 C. J. 40, Sec. 1551.

That the general rule is that an adjudication takes effect only between those who are parties or privies to the judgment and that it gives no rights to or against third parties requires the citation of no authority. The Supreme Court of the State of Indiana in the case of Aultman Miller and Company v. Timm et al., 93 Ind. 158, said:

> "The rule is that identity of name is presumptive of identity of person. Generally speaking, it will be considered sufficient prima facie evidence to show that a person bearing the same name as the party to the suit did the act with which it is sought to affect such party. Where facts are brought out which cast a doubt upon the identity of the party, this general rule will not be allowed to prevail." (Our emphasis.)

In Schofield v. Jennings, Admr., 68 Ind. 232, 235, the Supreme Court of Indiana said:

> "When two or more persons have the same name, proof is allowed, aliunde, to identify which person is meant, in any given transaction."

In Mode et al. v. Beasley, 143 Ind. 306, 333, it was stated that the strength of the inference depends largely upon circumstances and these may defeat entirely the presumption that would otherwise arise from mere identity of name. Mere proof that the name of the payee, being the same name endorsed on a note, was a common name

in the neighborhood, was sufficient to overcome the presumption of identity of the person from the identity of name.

In cases involving title to land (as here) where the same name appears successively in a chain of title as grantee and grantor, the presumption is that it is the same person in each case. In all such cases, however, it is held that the presumption of identity may be overcome by slight circumstances and the inference from identity of names vanishes if facts inconsistent with that identify appear.

Huston v. Graves (Mo.), 5 A. L. R. 423, 426, 427, Annotation 5 A. L. R. 428.

Here the chain of title discloses that one Don Hoover, a bachelor, of Jasper County, Indiana, took title to the real estate by deed; that Don Hoover, a bachelor, of Jasper County, Indiana, conveyed by deed to V-I-D, Inc.; that a judgment foreclosing special assessment liens against the real estate was obtained in a suit in the state court naming Don Hoover and ..... Hoover, his wife, residing in Gary, Lake County, Indiana, as parties defendant, and that they were served by the Sheriff of Lake County, Indiana, at their place of residence, 2212 W. 12th Avenue, Gary, and at execution sale to satisfy such judgment, the property was purchased by U. S. A. Company, the judgment plaintiff to whom a sheriff's certificate issued; that said certificate was duly assigned by said purchaser to the claimant, Marguerite Glover, who obtained a Sheriff's deed thereon.

Clearly the presumption that by reason of the same name, Don Hoover—the two Hoovers are one and the same is overcome for purposes of title at least, by the disclosure in the record that the one was the owner of the real estate and a bachelor residing in Jasper County, Indiana, and not a party to the suit, and the other a

married man residing in Lake County, Indiana, who had no interest in the real estate and who was a party to the suit and duly served with process and defaulted.

A purchaser from Don Hoover, the bachelor, would be entitled to rely upon that record, disclosing that his grantor, Don Hoover, the bachelor, not having been made a party to the suit, and not having been served with process therein, was not, nor was his real estate, affected by such judgment.

To summarize our position, let us state that in our opinion, no law or authority has been or can be cited which will preclude one whose property has been levied upon and sold by the Sheriff, to satisfy a good and valid judgment rendered against **another person of the same name**, from showing that fact in resisting an attempt by the purchaser at such sale to seize such property.

In addition to all that has been said, the judgment under which petitioner claims title has been vacated and set aside thereby making the Sheriff's Deed invalid.

CONCLUSION.

For the reasons that have been stated above it is submitted that the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, should be denied.

Respectfully submitted,

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KENNETH CALL,
Attorneys for Respondents.